PART III

INDIGENOUS PEOPLES AS ACTORS:
NEGOTIATING LAND RIGHTS

From a historical perspective, it could be said that after the age of dispossession, the age of forced integration and assimilation, and the age of rights,1 we are currently entering an age of negotiation between States and indigenous peoples. This movement is part of the larger development of international human rights law that has increasingly addressed the issue of political participation and, more generally, the democratic entitlements of minorities and indigenous peoples.2 One of the strong trends within human rights law is the increasing recognition that minorities and indigenous peoples should have more control in the conduct of their own affairs.3 In terms of land rights, these democratic entitlements are reflected by the rights of indigenous peoples to participate and be consulted in decisions affecting their territories and natural resources.

The spirit of ILO 169 is based on the notion of participation and consultation.4 Article 6(2) of ILO 169 states: “the consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.” The ILO Committee of Experts has emphasized that the spirit of consultation and participation constitutes the essence of Convention 169, which “requires that the parties involved seek to establish a dialogue allowing them to find appropriate solutions in an atmosphere of mutual respect and full participation.”5 The manual on the application of ILO 169 states:

1 See Patrick Thornberry, Indigenous Peoples and Human Rights (2002).


3 See Yash Ghai, Public Participation and Minorities (2001).


Convention No. 169 gives indigenous and tribal peoples the right to be consulted, and to express their views. It offers them the opportunity to participate in decision-making processes and to influence their outcomes. It provides the space for indigenous and tribal peoples to negotiate to protect their right.6

Thus, ILO 169 provides indigenous peoples with bargaining power. This bargaining power is especially relevant in matters concerning indigenous peoples’ territorial rights: Article 15 affirms that indigenous peoples have the right to participate in the use, management and conservation of the natural resources pertaining to their lands, and that indigenous peoples should be consulted over decisions relating mineral or sub-surface resources. On several occasions the ILO Committee of Experts has pointed out that Articles 13 and 14 of ILO 169 must be read in conjunction with Articles 2(1) and 6, “which require, respectively, that the state develop, with the participation of the affected Indigenous peoples, coordinated and systematic action to respect their rights and guarantee their integrity and; that Indigenous peoples must be consulted with and participate in decisions that affect them.”7 Similarly, the U.N. Declaration on the Rights of Indigenous Peoples strongly insists on the duty of States to consult indigenous peoples in any decision that may affect them and on the duty to ensure indigenous peoples’ participation in decisionmaking.8 Article 32 reads:

> Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of their mineral, water or other resources.

In the same vein, the Proposed American Declaration refers several times to the right of indigenous peoples to participate in decisions affecting them and regarding the management of their territories.9 Indigenous peoples’ entitlement to participation and consultation in decisions affecting them is not limited to instruments especially dedicated to indigenous peoples’ rights. In General Com-

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9 See especially arts. XV(2) and XVIII(5).